Order 97-11-14

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 7th day of November, 1997

Tower Air, Inc.

Violations of 49 U.S.C. §§41708 and 41712 and 14 CFR Part 250 and §399.84

Served November 7, 1997

CONSENT ORDER

This consent order concerns violations by Tower Air, Inc., (Tower) of the Department's denied boarding compensation rules (14 CFR Part 250), its requirements regarding the advertising or solicitation of air transportation and the price to be paid for such transportation, and its reporting requirements (49 U.S.C. §41708). Some of the advertisements in question failed to comply with 26 U.S.C. §7275, an Internal Revenue Code requirement, and all of the advertisements failed to comply with the full-fare advertising requirements of section 399.84 of the Department's regulations (14 CFR 399.84). The above conduct also constituted unfair and deceptive practices in violation of 49 U.S.C. §41712. This consent order directs Tower to cease and desist from future violations and to pay a compromise civil penalty.

Denied Boarding Compensation Violations

An investigation was conducted by the Department's Aviation Consumer Protection Division of the Office of Aviation Enforcement and Proceedings (Enforcement Office) into Tower's denied boarding compensation practices with respect to its domestic operations. That office discovered numerous violations of Part 250 by Tower during calendar year 1994, some of which continued until recently. This order, in part, reflects a settlement of the matters disclosed during that investigation.

Part 250 sets forth explicit consumer protection requirements for oversold flights, including rules mandating monetary compensation of passengers holding confirmed reservations who are denied boarding due to overbooking. Violations of Part 250 also constitute violations of 49 U.S.C. §41712 since any failure to comply with the Department's denied boarding compensation regulations represents an unfair and deceptive practice and unfair method of competition prohibited by section 41712.

Section 250.2b requires that, if a flight is oversold, an airline must first seek volunteers who are willing to give up their seats for compensation before involuntarily denying boarding (or "bumping") anyone. If there are insufficient volunteers, section 250.9 then requires each airline to give all passengers who are bumped a written statement describing their rights and explaining how the airline decides who is seated on the oversold flight. Section 250.6 provides that passengers who do not comply with the carrier's contract of carriage or tariffs regarding check-in deadlines are not eligible for denied boarding compensation. However, it is an unfair and deceptive practice under 49 U.S.C. §41712 for a carrier to declare passengers to be late check-ins when they are prevented from formally presenting their tickets at the ticket counter or boarding gate due to the length of the lines of people waiting to check–in.

Section 250.8 directs an air carrier to compensate passengers involuntarily denied boarding by cash or check on the day and at the place the denied boarding occurs. The amount of compensation depends on the price of the passenger's ticket and the length of the delay. Section 250.5 allows a carrier to offer free transportation in lieu of cash if the value of the transportation is equal to, or greater than, the required cash payment and the carrier informs the passenger of the cash compensation amount that would otherwise be due. Section 250.10 requires carriers to file quarterly information in Form 251 reports concerning the extent of their denied boarding activity.

The Department's investigation revealed that during 1994 Tower did not regularly seek volunteers who would be willing to give up their seats on oversold flights. In fact, the Form 251 reports filed by Tower for the period January through September 1994 state that no volunteers were willing to give up their seats for compensation of the carrier's choosing.

Furthermore, Tower's Form 251 reports for the calendar year 1994 state that "free tickets" constituted the only form of compensation paid by the carrier. The investigation revealed that Tower's standard practice at its ticket counters was to offer a free roundtrip ticket as its only form of denied boarding compensation, and to require the passenger to sign a form releasing Tower from "any further liability in this matter" as a condition for the issuance of the ticket. While issuing free tickets in lieu of cash is permitted under certain circumstances by section 250.5, the information developed in the investigation indicates that Tower did not offer to pay cash or issue checks at its ticket counters or boarding gates. Moreover, the carrier did not even have the capability to issue cash or checks in the appropriate amount to qualified passengers if such a request was made. By not paying cash or issuing checks at the time and place where the denied boarding occurred, or even being able to do so, Tower Air violated section 250.8 and 49 U.S.C. §41712. *Mexicana Denied Boarding Violations,* Order 93-8-25.

The information developed in the investigation also revealed serious deficiencies from calendar year 1994 until recently in Tower's procedures for determining whether passengers were "late check-ins" and therefore not entitled to denied boarding compensation. Numerous complaints alleged that Tower employees stamped passengers' tickets with a "Late Check-in" or "Arrived Late" notation or marked a time on their tickets after the passengers had been waiting in line for check-in for some time, frequently for half an hour or more. In either situation, the evidence indicates that the "Late Check-in" or "Arrived Late" notation was made without regard to when the passenger got in line. Tower's practice appears to have been to use the "Late Check-in" or "Arrived Late" notation or time of day notation as grounds for denying eligibility for denied boarding compensation. Subsequently, however, if the same passenger complained to the carrier in writing and denied that there was a late check-in, Tower would offer to pay the passenger the appropriate denied boarding compensation. The above-described practice of improperly assigning check-in times as a basis for denying eligibility for denied boarding compensation constitutes a violation of Part 250 and an unfair and deceptive practice and unfair method of competition within the meaning of 49 U.S.C. 41712.

As part of the Department's investigation, Tower supplied information supporting its Form 251 reports for the first and second quarters of 1994. This information detailed all denied boarding incidents by date, airport, flight number, number of persons affected, and included a breakdown of the total number of persons denied boarding by various categories such as late check-ins, and aircraft substitutions. Comparing these data with other data developed in the investigation revealed numerous instances of days and/or flights on which Tower conceded that denied boardings had occurred and that it had paid compensation, but where there was no denied boarding or payment of compensation reported in the Form 251 reports filed by Tower. These inconsistencies amount to a violation of Part 250 and they call into question the accuracy of all the Form 251 reports that Tower has filed with the Department. By submitting inaccurate reports, Tower also violated 49 U.S.C. §41708.

In mitigation, Tower states that immediately prior to the time when the above-described violations took place in 1994, Tower substantially increased the frequency and scope of its domestic operations. Passenger response to these increases exceeded the company's then-existing automated field station and central reservation system, necessitating the use of largely manual procedures during this initial period. According to Tower, its use of large B-747 aircraft, totally refundable tickets, manual controls and operations, limited staffing for a maximum of once-a-day frequencies and limited experience on which to set overbooking levels all contributed to a difficult operating environment.

To compound matters, Tower points out that it did not at the time participate in the computer reservations systems used by most U.S. travel agents. As a consequence, when several large travel events, such as the World Cup finals in Los Angeles, occurred during a short period of time, numerous travel agents issued Tower tickets without Tower having been properly advised that reservations had been made.

Tower states that immediately following these events, Tower began to automate station check-in procedures and developed central reservations automation systems with which to monitor inventory and measure and manage overbooking profiles in each market. It also initiated participation in all U.S.-based, and the two most prominent European-based, computer reservations systems used by travel agents. Additionally, Tower invested substantially in the selection, supervision and training of customer service personnel and the development and publication of detailed denied boarding procedures.

Tower believes that the steps it has taken to ameliorate the problems outlined above have entirely corrected its temporary difficulties, and that its denied boarding compensation practices have been in full conformity with the Department's requirements since those steps were taken.

Advertising Violations

Over the past several years, through a series of industry letters and enforcement orders, we have placed airlines and travel companies directly on notice of their obligation to conform to our advertising requirements and enforcement policy. In the period from June 1995 to the present, Tower has published advertisements on numerous occasions which failed to comply with these requirements and policies.

Under the long-standing policy of the Department, and the Civil Aeronautics Board before it, the failure to disclose significant restrictions, such as capacity controls, nonrefundability requirements, and change in itinerary fees, in fare advertisements is considered to be an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. §41712 and has been the subject of enforcement actions. (See, *e.g.*, December 20, 1994, letter from Secretary Peña to 59 airline chief executives and Order 96-4-47.)

In addition, section 399.84 of the Department's regulations (14 CFR 399.84) requires that any advertising or solicitation for air transportation that states a price for such air transportation must state the entire price to be paid.[1] When advertisements do not conform to the requirements of section 399.84, they also violate section 41712.

The Enforcement Office has, as a matter of enforcement policy, permitted carriers to state separately in fare advertisements government-imposed and -approved taxes and fees collected by the carriers, such as custom fees, departure taxes, and PFCs, so long as the charges are levied and collected on a per-passenger basis and their existence and amount are clearly indicated in the advertisement. (See, *e.g.*, December 20, 1994, letter from Secretary Peña and May 1, 1992, letter from the Enforcement Office to U.S. and Foreign Air Carriers.) Tower and many other carriers were reminded of this enforcement policy in a letter from the Enforcement office, dated July 14, 1995.

This policy also covers fees imposed by foreign governments such as foreign departure taxes. (See, *e.g.*, that July 14, 1995, letter and Order 96-1-32.) Fees imposed by government entities on other than a per-passenger basis, such as an *ad valorem* fuel tax or excise tax, must be included in the advertised total price to be paid by the seller and may not be stated separately. (See, *e.g.*, 54 Fed. Reg. 31,052, July 26, 1989, and Order 93-4-40.) Furthermore, general phrases that preclude consumers from calculating an actual, maximum, or range of government-imposed fees, such as "additional taxes and surcharges may apply" do not satisfy our full-price advertising rule.

We consider any advertisements that do not comply with the above policies to be a violation of both section 41712 and section 399.84, and we have pursued enforcement action against carriers that have failed to comply with these requirements. (See, *e.g.*, Orders 96-6-25, 96-4-47, 96-1-13, 95-11-3, 95-1-39, 93-4-40, 92-10-41, and 92-7-19.) Tower has routinely violated our advertising requirements as is shown by the incidents listed below.

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1 The Internal Revenue Code has a separate requirement governing the inclusion of any applicable Federal excise tax in advertised airfares. Specifically, 26 U.S.C. §7275 requires, with an exception that is not relevant here, that advertising for air transportation state the cost of the air transportation as the total of the amount paid for the air transportation and any applicable excise tax imposed on the air transportation.

- In the period June through August, 1995, Tower published four advertisements in each of two New York newspapers promoting one-way fares from New York to San Francisco and San Juan, Puerto Rico, and two advertisements in a San Juan newspaper promoting the same type of fares from San Juan to New York. The advertisements failed to disclose that flights originating from New York and San Juan require the payment of a $3 passenger facility charge (PFC) in addition to the fare for the service offered. Since Tower's advertisements did not include any mention of the PFCs that had to be paid in addition to the fares for the services offered, the advertisements did not comply with the Department's full price advertising regulations and were unfair and deceptive within the meaning of section 41712.

- On June 23, 1996, Tower published an advertisement in a New York newspaper which separated out a $3.00 fuel surcharge for San Juan departures and did not disclose that all of the advertised fares were capacity controlled. Since Tower's newspaper advertisement did not include the fuel surcharge in the total price advertised, and did not disclose the fact that the fares were subject to capacity controls, the advertisement did not comply with 14 CFR 399.84 and was unfair and deceptive within the meaning of section 41712.

- On September 3, 1996, Tower published an advertisement in a New York newspaper promoting, *inter alia*, a $199 fare from New York to Paris, which stated that the "Paris fare does not include applicable taxes." Since Tower's advertisement did not state specifically in dollar amounts the applicable taxes, the advertisement did not comply with 14 CFR 399.84 and was unfair and deceptive within the meaning of section 41712.

- In the latter part of October 1996, Tower published advertisements in newspapers in New York, Miami and two cities in Southern California promoting fares between New York and Miami, Los Angeles, and Oakland. The advertisements stated that the "Fares do not include an additional 10 % federal excise tax when applicable." Since the fares did not include the federal excise tax when applicable, the advertisements did not comply with 14 CFR 339.84 and were unfair and deceptive within the meaning of section 41712.[2]

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[2] The advertisements also appear to have violated 26 U.S.C. §7275.

- On February 12, 1997, Tower published an advertisement in a Miami newspaper promoting fares from Miami to New York and in three international markets: New York-Paris, Miami-Tel Aviv, and Miami-Sao Paulo. The advertisement did not mention the PFCs that had to be paid in addition to the air fares advertised. In addition, the advertisement featured a bold-print headline that stated that "Every Seat Fully Refundable with No Restrictions and No Change Fees, " even though none of the three international fares were fully-refundable[3] and all required a $100 change fee for each change. Since Tower's advertisement did not include any mention of the PFCs that had to be paid in addition to the fares for the services offered, and incorrectly stated or did not disclose the fact that the fares were not completely refundable and were subject to cancellation and change in itinerary fees, the advertisement violated 14 CFR 339.84 and was unfair and deceptive within the meaning of section 41712.

- On September 8, 1997, Tower published an advertisement in *Travel Agent* magazine announcing a $299 refundable, roundtrip fare from JFK to Las Vegas. The fare was not fully refundable and did not include PFCs. Since Tower's advertisement did not include any mention of the PFCs that had to be paid in addition to the fares for the service offered, and did not disclose the fact that the fares were not completely refundable, the advertisement violated 14 CFR 339.84 and was unfair and deceptive within the meaning of section 41712.

In mitigation, Tower states that it has had a long-standing policy of referring all proposed advertising to legal counsel to ensure conformity with all legal requirements but that this practice was apparently not followed by the officials responsible for this program during the period outlined above. The official previously responsible for this program is no longer working for Tower and the company believes that its advertising will therefore be in full conformity with all applicable legal requirements in the future.

In order to avoid litigation, and without admitting or denying the alleged violations, Tower has agreed to a settlement of this matter with the Enforcement Office. Tower consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. §§41708 and 41712, and 14 CFR Part 250 and 14 CFR 399.84, and to an assessment of $90,000 in compromise of potential civil

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[3] The New York-Paris and the Miami-Tel Aviv fares were both totally non-refundable. The Miami-Sao Paulo fare was only partially refundable since it was subject to a $100 cancellation fee.

penalties. We believe that this settlement is appropriate and serves the public interest. It represents an adequate deterrence to future noncompliance with the above-cited statutory and regulatory requirements by Tower, as well as by other carriers.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as in the public interest;

2. We find that Tower Air, Inc., violated 14 CFR Part 250 by (1) failing to seek volunteers who would be willing to give up their seats for compensation on overbooked flights; (2) not paying cash or issuing checks at its ticket counters or boarding gates in the appropriate amount to qualified passengers who were denied boarding; (3) enforcing its check-in deadlines improperly; and (4) submitting inaccurate Form 251 reports to the Department;

3. We find that Tower Air, Inc., violated 49 U.S.C. §41708 by submitting inaccurate Form 251 reports to the Department:

4. We find that Tower Air, Inc., violated 14 CFR 399.84 by advertising fares which failed to state the total price to be paid;

5. We find that Tower Air, Inc., violated 49 U.S.C. §41712 by engaging in the conduct described in paragraphs 2 through 4, above, and by failing to disclose the fact that advertised fares were subject to capacity controls, were not completely refundable, and were subject to cancellation and change in itinerary fees;

6. We order Tower Air, Inc., and all other entities owned or controlled by or under common ownership with Tower Air, Inc., and their successors and assignees, to cease and desist from further violations of 14 CFR Part 250 and 14 CFR 399.84, and 49 U.S.C. §§41708 and 41712, as described above;

7. Tower Air, Inc., is assessed $90,000 in compromise of the potential civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 through 5 of this order. and

8. Payment shall be made within 15 days of the date of issuance of this order by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the attached instructions. Failure to pay the penalty as ordered will subject

Tower Air, Inc., to assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)